IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1538 of 2007
With
SPECIAL CIVIL APPLICATION No. 1539 of 2007
To
SPECIAL CIVIL APPLICATION No. 1552 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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N L JOSHI & 14 - Petitioner(s)
Versus
UNION OF INDIA & 4 - Respondent(s)

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Appearance :
MR RK MISHRA for Petitioner(s) : 1 - 15.
MR AJ DESAI for Respondent(s) : 1,
GOVERNMENT PLEADER for Respondent(s) : 2 - 4.

None for Respondent(s) : 5,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 25/01/2007

ORAL COMMON JUDGMENT :

1. Heard learned Advocate Mr. R.K. Mishra for the petitioners, Mr.AJ Desai, learned Additional Standing Counsel for respondent NO.1 and Mr. Apurva Dave, learned AGP for respondents NO.2-4.

2. In this group, petitioners are praying for the following relief as per para 17(A) (B) (C) (D) (DD) and (E) of the petition being Special Civil Application NO. 1538 of 2007 :

“17(A) Your Lordships may be pleased to hold and declare the action on the part of the respondent authorities of taking the decision of appointing the Female Health Workers in the fixed salary of Rs.2500/- based on the Government Resolution dated 16.2.2006 to be illegal, arbitrary,

unconstitutional, irrational against the enunciated principle of law by the Hon'ble Courts.

(B) Your Lordships may be pleased to quash and set aside the Government Resolution dated 16.2.2006 to be illegal, arbitrary, unconstitutional, being violative of Articles 14, 16 and 21 of the Constitution of India.

(C) Your Lordships may be pleased to hold and declare that since the petitioners are regularly selected candidates, they have been imparted training by the Government for 18 months and have been issued with such certificates as Female Health Workers on the successful completion of such training of 18 months, thereafter they came to be appointed on the running time scale salary of Rs.3050-4590, they are entitled to running time scale grade and they are also entitled to continue into the services unless they are required to be removed on the ground of misconduct or

unsuitability.

(D) Your Lordships may be pleased to restrain the respondent authorities from altering the service conditions of the petitioners in any manner whatsoever by holding that the services rendered by the petitioners are indispensable in pursuit of the policy and policy decision of the Government of India in pursuit of the Constitutional aims and goal under Part IV of the Constitution of India, therefore, since the Government of India has not directed to and has not stopped the time scale salary to the petitioner, it is incompetent without jurisdiction and authority of law for the State Government to reduce the running time scale grade of the petitioners and to compel them to accept the appointment to fixed salary of Rs.2500/- Therefore, the action on the part of the respondent is illegal, irrational, arbitrary unconstitutional therefore null and void.

(DD)Your Lordships may be pleased to hold and

declare the order vide Annexure M dated 28.12.2006 to be illegal arbitrary unconstitutional to the extent of 11 months period and fixed time scale salary and further hold and declare that the petitioners are entitled to continue into the services in the running time scale salary of Rs.3050-4590.

(E) Your Lordships may be pleased to pass any further other order/s as are deemed fit just and proper in the facts and circumstances of the case and in the interest of justice. “

3. Thus, as per prayer clause (A), petitioner is challenging the order of appointment issued in favour of the petitioner by the respondents on 28.12.2006 at Page-104 (Annexure-M).It is necessary to be noted that the petitioner has also challenged GR dated 16.2.2006 as violative of Article 14 and 16 of the Constitution of India. Petitioner is also praying that they are entitled for regular scale of Rs.3050-4590 alteration in

condition of service is also challenged by the petitioners by fixing salary of the petitioner by order dated 28.12.2006 Annexure-N. Learned Advocate Mr. Mishra submitted that the order dated 28.12.2006 which has been issued by the respondents in favour of the petitioners is contrary to the GR dated 16.2.2006. He also submitted that it is also contrary to the spirit of GR dated 16.2.2006. He emphasized on the basis of the fact that under GR dated 16.2.2006, petitioners are entitled for five years continuous service in the fixed salary and thereafter, they are entitled for regular pay scale of the post but in this case, according to the learned advocate Mr. Mishra, each year, 11 months order has been issued in favour of the petitioners in fixed salary and, therefore, order dated 28.12.2006 is contrary to GR dated 16.2.2006. He also submitted that the Government of India is giving grant of the salary which has to be

paid to the female health workers received from the Union of India in the year 2006-2007. He also submitted that in grant, there is no such provision which would require reduction of salary of female health worker. According to his submission,decision as per the GR dated 16.2.2006 is the decision of the Cabinet and not by the Secretary and therefore how the petitioner will approach the respondent Secretary? He has relied upon the decision of this Court in group of matters being Special Civil Application NO. 27444 of 2006 and allied matters decided on 9.1.2007 by this court and has placed reliance on para 9 which is reproduced as under:

“9. In the facts of this case, there is no further appointment order issued by respondents in favour of petitioners either in fixed salary or any regular scale. So, in absence of order being a contractual appointment comes to an end after completion of 11 months period, petitioners have no

legal right statutory right or constitutional right to claim regularization or permanent job or continuation in service in a regular scale, therefore, in absence of legal right or statutory right, writ of mandamus cannot be issued against the respondents while exercising the power under Article 226 of the Constitution of India. Therefore, according to my opinion, petitioners are not having any legal right to remain continued in service in absence of further order as their contract period has come to an end on 6.1.2007, therefore, petitioners cannot claim continuation in service in absence of further fresh order to be issued by respondents in favour of petitioners. Therefore, according to my opinion, there is no substance in the present petitions. Accordingly, present petitions are disposed of. Ad-interim relief granted by this Court on 3.1.2007 stands vacated. “

4. I have considered the submissions made by the learned Advocate Mr. Mishra. Thereafter, I suggested to learned Advocate Mr. Mishra, whether the petitioners are prepared to make representation to the respondents in respect of the grievance voiced in these petitions or not. Thereafter, learned Advocate Mr. Mishra has consulted one of the petitioners who was

present in the Court and then submitted that the petitioners are not prepared to make representation to the petitioner. Therefore, this Court has considered legal aspects of the matter and passed the order.

5. Except that, there is no other submission made by the learned Advocate MR. RK Mishra before this Court. He has not cited any decision of the Hon'ble High Court or the Hon'ble Supreme Court in support of his submissions. He pointed out that the petitioners are at present working with the respondents as per order dated 28.12.2006 and are receiving fixed salary from the respondents.

6. Before entering into the merits of the matter, this court has put question to learned Advocate Mr. Mishra as to whether the petitioners have approached the respondents by way of any representation before filing these petitions or not and if yes, whether the respondents have passed any adverse order in response to such representation or not

because petitioners can approach this Court invoking extra ordinary jurisdiction under Article 226 of the Constitution of India only thereafter. If the petitioners want relief from this Court under Article 226 of the Constitution of India, then, petitioner must first approach the respondents. Learned Advocate MR. Mishra has not been able to give any answer to this question put by this Court. In entire petition, no such averment has been made by the petitioners as to whether they have approached the respondents before filing of these petitions or not. NO document has been produced to justify that before filing the present petitions, petitioners have approached the respondents in respect of the grievances raised in these petitions. Therefore, I am examining the only issue that before praying for issuance of writ of mandamus from this court under Article 226 of the Constitution of India,whether prior approach is must or

not and whether petition without such prior approach is maintainable or not. This aspect has been examined by the apex court in Saraswati Industrial Syndicate Ltd. Etc. v. Union of India reported in AIR 1975 SC 460. Relevant para 24 and 25 are reproduced as under:

> “24. As the appeals fail on merits we need not discuss the technical difficulty which an application for a writ of certiorari would encounter when no quasi-judicial proceeding was before the High Court. The powers of the High Court under Article 226 are not strictly confined to the limits to which proceedings for prerogative writs are subject in English practice. Nevertheless, the well-recognized rule that no writ or order in the nature of a Mandamus would issue when there is no failure to perform a mandatory duty applies in this country as well. Even in cases of alleged breaches of mandatory duties, the salutary general role, which is subject to certain exceptions, applied by us, as it is in England, when a writ of Mandamus is asked for, could be stated as we find it set out in Halsbury's Laws of

England (3rd edition, Vol. 13, p. 106):

"As a general rule the order will not be granted unless the party complained of has known what it was he was required to do, so that he had the means of considering whether or not he should comply and it must be shown by evidence that there was a distinct demand of that which the party seeking the: mandamus desires to enforce, and that that demand was met by a refusal."

25. In the cases before us there was no such demand or refusal. Thus, no ground whatsoever is shown here for the issue of any writ, order, or direction under Article 226 of the Constitution. These appeals must be and are, hereby, dismissed but in the circumstances of the case we make no order as to costs.”

7. In Amrit Lal Berry , KN Kapur and others v. Collector of Central Excise, Central Revenue and others, reported in AIR 1975 SC 538, apex court observed as under in para 25:

“25. In the petition of K. N. Kapur and others, we do not even find an assertion that any representation was made against any

violation of a petitioner's right. Hence, the rule recognised by this Court in Kamini Kumar Das v. State of West Bengal, AIR 1972 SC 2060 at p. 2065 that a demand for justice and its refusal must precede the filing of a petition asking for direction or Writ of Mandamus, would also operate against the petitioners."

8. In State of Haryana and another v. Charan Mal etc. reported in AIR 1976 SC 1654, apex court observed as under in para 42:

42. We proceed to record our conclusions as follows:

1. The Haryana Minerals (Vesting of Rights) Act, 1973, is valid, as it is not, in any way, repugnant to the provisions of the Mines and Minerals (Regulation of Development) Act 67 of 1957, made by Parliament. Ownership rights could be and have been validly acquired by the Haryana Govt. under the Haryana Act.

2. No rights are shown by any petitioner before us to have been conferred upon him under any lease or licence executed or brought in accordance with the provisions of the Central Act 67 of 1957, but, any petitioner, either before the High Court

or in this Court, now before us, who can establish any such right governed by the provisions of the Central Act, 67 of 1957 may take such proceedings before an appropriate Court, if so advised as may still be open to him under the law, against any such action or Govt. notification as is alleged to infringe that right. We are unable to find any such right in any writ petition, as framed, now before us.

3. Any petitioner who applies for a writ or order in the nature of a Mandamus should, in compliance with a well known rule of practice, ordinarily, first call upon the authority concerned to discharge its legal obligation and show that it has refused or neglected to carry it out within a reasonable time before applying to a Court for such an order even where the alleged obligation is established.

9. In Dr. G. Sarana v. University of Lucknow and others, reported in AIR 1976 SC 2428, apex court observed as under in para 16:

“16. It is also difficult to understand how the writ petition or for that matter the present appeal before us is

maintainable when the recommendation of the Selection Committee has still to be scrutinized by the Executive Council of the University and either accepted or rejected by it and other remedies by way of representation to the Executive Council and an application for reference of the matter under Section 68 of the Uttar Pradesh Universities (Re-enactment and Amendment) Act, 1974, to the Chancellor are still open to the appellant and have not been exhausted."

10. In Balwant Singh Parhar & Anr. v. Union of India & Ors. Reported in 2006 Lab IC 2081, Division Bench of Rajasthan High Court observed as under in para 19:

> "19. From the record of the writ petition it appears that the petitioners have neither given any representation to the Pay Commission nor to the Union of India nor Railway Administration nor given any notice for demanded of justice and straightway filed the writ petition for seeking mandamus in the matter of pay parity contrary to the well

established principle of law that giving notice for giving notice for demand of justice is sine qua non for seeking writ of mandamus, the writ petition deserves to be dismissed on this ground alone as there was no occasion for the respondents to consider the grievance of the petitioners of claim of parity in pay scale and also consider the objection of the respondents in reply of interference by the High Court under Article 226 of the Constitution of India in such matters. In the judgments cited by the counsel for the petitioners, it is nowhere laid down that the Court should evalute the job for the purpose of grant of equal pay for equal work. On the contrary, in some of the judgments of the Supreme Court cited on behalf of the petitioners also and in the other judgments, it has been repeatedly held by the Supreme Court that it is not for the Court to make job evolution for the purpose of considering the equation

> of post and parity in pay scale and it is for the Government to consider and decide. Thus it would not be proper for this Court to make an enquiry in the matter of equation of post as well as grant of equal pay scale in absence of any representation to the respondents or pay Commission and findings thereon. Therefore, we may observe that it is open for the petitioner to make a representation to the respondents/ Pay Commission as and when it is constituted in the matter of parity in pay scale and it is further expected from the respondents/Pay Commission to consider the same and pass the appropriate order."

11. In view of the above observations made by the apex court and the high court of Rajasthan, direct petition for a writ of mandamus without prior approach to the respondents is not maintainable. Unless and until the petitioner made approach to the respondents by way of representation and if the representation is rejected and/or there

is inaction on the part of the authorities in deciding such representation, the petition can,ordinarily, not to be entertained by this court.

12. Looking to the facts of this case, by order dated 28.12.2006, petitioners have been appointed for a period of 11 months in the fixed salary of Rs.2500.00 as per condition attached to the order at page 106. According to Condition 1, said appointment is completely Hamgami and on ad.hoc basis and, therefore, services of such employee can be terminated at any time without assigning any reason and/or notice. Undertaking was given by each of the petitioners that their service is Hangami, Ad.hoc to the respondents. If regular candidate is available, then also, service is terminable even prior to completion of eleven months as per order dated 28.12.2006. It is also made clear in order dated 28.12.2006 that no government benefits will be available to the petitioner

while working as Female Health Worker on fixed salary. These are the conditions which have been prescribed in the order of appointment and they have been accepted by the petitioners by giving undertaking to the respondents. Writ of mandamus can be issued only when there is violation of statutory, legal or constitutional right of the petitioner by the respondent authorities. In absence of violation of legal right, writ of mandamus cannot be issued by the High Court against the respondents under Article 226 of the Constitution of India. Which legal or constitutional right of the petitioner has been infringed by the respondents, that has not at all been high lighted by the learned Advocate Mr.Mishra before this Court. Petitioners have, thus, not been able to establish before this Court that their legal / statutory or constitutional right has been infringed by the respondents by giving them eleven months order on ad hoc basis in

fixed salary. So, in absence of violation of such legal right, statutory right or constitutional right, petitioner are not entitled to invoke extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India and, therefore, these petitions are not maintainable. It is more so when the petitioners have approached this Court directly without first approaching the respondents. I have considered the submission made by the learned Advocate Mr. Mishra that the order dated 28.12.2006 appointing the petitioners for 11 months in fixed salary of Rs.2500.00 is contrary to the Government Policy dated 16.2.2006 or it is not in consonance with the spirit of the said resolution. Considering the prayers made by the petitioners, on one hand, learned Advocate MR. Mishra is taking shelter of the GR dated 16.2.2006 for challenging the order dated 28.12.2006 but in another way, looking to the prayers made by the petitioners, in

para 17(B), petitioners are also praying for quashing and setting aside the GR dated 16.2.2006 for which shelter has been taken while making submission by the learned Advocate Mr. Mishra. This itself is contradictory submission made by the learned Advocate Mr. Mishra that on one hand, he wants to have shelter of GR dated 16.2.2006 and on the other hand, he is challenging the GR dated 16.2.2006. So, if the petitioner is having any grievance against the order of appointment or the conditions incorporated therein, then, it is the duty of the petitioners to first approach the respondents by way of some suitable representation that there is something wrong or that their legal or constitutional rights have been violated and after that, if there is no answer or if there is negative answer from the respondents, then the petitioners can approach this court under Article 226 of the Constitution of India.

13.Recently, apex court has examined identical question in case of Anganwadi workers, in State of Karnataka & Ors. Ameerbi & Ors. Reported in JT 2007 (1) SC 279. Apex Court observed as under in the said judgment:

“ **SERVICE AND LABOUR LAWS :**

Administrative Tribunals Act, 1985 Sections 3 (k) and 15 – Constitution of India, 1950 – article 309 – Public employment – Meaning of 'post' – Who is entitled to move Administrative Tribunal for relief – Integrated Child Development Scheme floated and funded by the Central Government – Implementation of the Scheme left to the State Governments – Pursuant to the Scheme appellant State appointing Anganawadi workers – Such workers filing an application before the State Administrative Tribunal seeking certain relief in the matter of their employment – Tribunal holding the application to be not maintainable – On a reference a larger Bench of the Tribunal however taking the view that the anganwadi workers though were paid only a honorarium and not regular salary nevertheless held

civil posts and therefore their application were maintainable - Validity – Whether Anganwadi workers were Government employees – Whether Administrative Tribunal had jurisdiction to entertain their applications. Allowing the appeals of the State held that deferent tests are applicable for determining the relationship of employer and employee. Respondents not having been appointed under any permanent scheme rules framed under article 309 would not be applicable. Though the recruitment process was carried out through a selection committee and the services of respondents were continued for a long time they cannot be considered to be holding civil posts. Doctrine of parity of employment not applicable. Administrative Tribunal therefore had no jurisdiction to entertain their applications.

HELD :

Anganwadi workers, however, do not carry on any function of the State. They do not hold post under a statute. Their posts are not created. Recruitment rules ordinarily applicable to the employees of the

State are not applicable in their case. The State is not required to comply with the constitutional scheme of equality as adumbrated under Articles 14 and 16 of the Constitution of India. No process of selection for the purpose of their appointment within the think that the said decision has any application in the instant case. (Para 20)

Rules framed under proviso to Article 309 of the Constitution of India are not attracted in the case of the respondents. They are appointed under a scheme which is not of a permanent nature although might have continued for a long time. (Para 29)

Appointments made under a scheme and recruitment process being carried out through a committee, in our opinion, would not render the incumbents thereof holders of civil post. Our attention has not been drawn to any rule or regulation governing the mode of their recruitment. Some statements in this behalf have been made by the interveners but for the reasons stated hereinbefore , we cannot enter thereinto. A

distinction must be made about a post created by the Central Government or the State Governments in exercise of their power under Articles 77 or 162 of the Constitution of India or a statute vis-a -vis a nature who are sui generis. Terms and conditions of services of an employee may be referable to acts of appropriate legislature. The matter may also come within the purview of Article 309 of the Constitution of India as proviso appended thereto confers power upon the President or the Governor of a State or other authority, who may be delegated with such power, to make rules during the inter regnum. (Para 30)

Different tests applied even for determining the relationship of employer and employee have recently been noticed by this Court in District Rehabilitation Officer & Ors. v. Jay Kishor Maity & Ors. (JT 2006 (10) SC 276). In that case, in almost similar project, the employees appointed by the District Rehabilitation Center Government employees. Each case, therefore, has to be considered on its own merits. (Para 36)

It is also not a case where the doctrine of parity of employment can be invoked. It is true that nomenclature of a term of payment is not decisive but the substance is as was held in Jaya Bachchan v. Union of India and Others. (JT 2006 (5) SC 414), but the question has to be determined having regard to the issue invoked. We are concerned herein with only one question, viz. Whether the respondents are holders of any civil post. We are, having regard to the materials on record, of the view they are not. (Para 39)

14. Undisputedly, before filing these petitions, the petitioners have not approached the respondents by way of some suitable representation pointing out their grievance raised in these petitions and straightway, petitions have been filed. Therefore, according to my opinion, petitions are not maintainable as petitioners have not made any prior approach to the respondents. Therefore, in absence of such prior approach, petitions are not maintainable as per the view taken by

the apex court. The petitioners are also not able to justify or establish before this Court that whether any legal / statutory or constitutional right is violated by respondent or not. The petitioners are failed to establish violation of any legal right by respondent while issuing appointment order dated 28.2.2006. Therefore also, according to my opinion, there is no substance in these petitions and same are required to be dismissed at the threshold.

15.Accordingly, these petitions are dismissed.

(H.K. Rathod,J.)

Vyas